No. 11,651

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN, as Executrix of the Last Will and Testament of Gerald FitzGerald, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan FitzGerald, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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FILED

SEP - 4 1947

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BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The only previous opinion in this case is the memorandum opinion of the District Court (R. 16-19), which is not yet reported.

JURISDICTION.

This appeal involves the assessment and collection of additional federal estate taxes. The taxes in the sum of $5,026.38 in dispute were assessed by the Commissioner of Internal Revenue against the estate of Lillian Ryan FitzGerald, deceased (R. 5, 16, 21-22), and were paid by the administrator to the Collector of Internal Revenue on January 12, 1942. (R. 5, 16, 22.) The claim for the refund thereof together with interest from January 12, 1942, the date of payment, was filed on November 16, 1945 (R. 6-7, 16, 23), and was rejected by the Commissioner by notice dated December 28, 1945. (R. 7, 23.) On April 5, 1946, within the time provided by Section 3772 of the Internal Revenue Code, the appellants brought the suit in the District Court for recovery of those taxes and the interest thereon according to law. (R. 2-7.) Jurisdiction was conferred on the District Court by Section 24, Fifth and Twentieth, of the Judicial Code, as amended. The judgment was entered on April 14, 1947, in favor of the United States, dismissing the plaintiff-appellants' action with costs. (R. 25-26.) Thereafter, within three months, the appellants' notice of appeal was filed on April 17, 1947. (R. 26.) The jurisdiction of this Court is invoked under the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Whether claims for refund of estate taxes must be filed within three years after the payment of the tax as provided by Section 910 of the Internal Revenue Code or within four years after the payment of the tax as provided by Section 3313 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

Sec. 910. Period of Limitation for Filing Claims.

> All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.
>
> (26 U.S.C. 1940 ed., Sec. 910.)

Sec. 3313. Period of Limitation Upon Refunds and Credits.

> All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate,

and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

(26 U.S.C. 1940 ed., Sec. 3313.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.96. *Claim for refund.*—A claim for refund of estate tax, or for refund of interest or penalties, erroneously or illegally collected, should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. * * *

Claims for the refund of estate tax imposed by the Internal Revenue Code must be filed within three years next after the payment of the amount sought to be refunded.

The amount of the refund shall not exceed the portion of the tax paid during the three year period immediately preceding the filing of the claim, or the filing of the petition with the Board of Tax Appeals. * * *

STATEMENT.

The pertinent facts, sufficient for the purposes herein, were found by the District Court substantially as follows (R. 20-23):

The appellants, residents of the Northern District of California, brought this action to recover estate taxes alleged to have been erroneously and illegally assessed by the Commissioner and collected by Nat Rogan, now deceased, who was then the Collector of Internal Revenue for the Sixth District of California. (R. 20.)

At all times herein, and until his discharge on December 21, 1942 (R. 22), appellant Edward F. Treadwell was the duly appointed, qualified and acting administrator of the estate of Lillian Ryan FitzGerald (hereinafter called the decedent) who prior to the times herein had died a resident of California, leaving an estate therein.[1] (R. 20-21.) Within the

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[1]The District Court found that the local probate court for the County of Los Angeles, California, having jurisdiction of the administration over the decedent-taxpayer's estate, distributed all her property to her children, Geraldine FitzGerald CalLaghan, Suzanne FitzGerald Fawcett and Gerald FitzGerald, a minor (deceased March 2, 1945), and discharged administrator Treadwell on December 21, 1942; that thereafter the probate court having jurisdiction over the estate of Gerald FitzGerald, deceased, appointed Geraldine FitzGerald Callaghan as executrix of his last will and testament; and that she duly qualified as such and has been ever since that time the duly appointed, qualified and acting executrix of his last will and testament. (R. 22-23.)

The instant suit was brought in the names of the distributees of the decedent's estate because the estate had been distributed and the administrator, who paid the tax, had been discharged, as the appellants state (Br. 2), and the court below held that they were the proper parties-plaintiff herein because they were the distributees of the estate from which the tax had been collected. (R. 23, par. II.)

time and in the manner provided by law, the decedent's administrator duly elected to pay the federal estate tax on the value of the estate's assets one year after the date of death. Thereafter, the Commissioner made an assessment of estate tax on her estate at the value thereof one year after the date of her death. (R. 21.)

Prior to the time the Commissioner made such assessment, however, the Treasury Department had adopted certain regulations which provided for the inclusion in a decedent's gross estate of dividends paid on corporate stock held by the estate during the year following the date of death. (R. 21.) Accordingly, the Commissioner added to the value of her gross estate the sum of $27,199, declared and received by the estate during the year next ensuing the date of her death, as dividends on stocks owned by her and her estate. (R. 21-22.) The inclusion of the dividends in the gross estate increased the tax assessed in the sum of $5,026.38, which was paid to the Collector on January 12, 1942. (R. 22.)

Thereafter, on November 16, 1945, approximately three years and ten months after payment of the tax, the appellants filed with the Commissioner a claim for refund (Form 843) of the above-stated additional tax, together with interest thereon from January 12, 1942, the date of payment of the tax. (R. 23.) The Commissioner rejected the claim on December 28, 1945, as not timely filed (R. 23), whereupon the appellants brought suit on April 5, 1946. (R. 2-7.)

Upon the basis of the foregoing facts, the District Court found and held that the action herein must be

dismissed for lack of jurisdiction because the claim for refund of the estate tax upon which it was based was not timely filed with the Commissioner. (R. 16-19, 24.) The Court below thereupon entered judgment accordingly from which the appellants appealed to this Court for review. (R. 25-26.)

SUMMARY OF ARGUMENT.

Section 910 of the Internal Revenue Code provides that all claims for the refunding of estate taxes alleged to have been erroneously assessed or collected must be presented to the Commissioner within three years after the payment of the tax. Section 3313 provides that all claims for the refunding of any internal revenue tax erroneously assessed or collected must, except as otherwise provided by law for income, war-profits, excess-profits, estate and gift taxes, be presented to the Commissioner within four years after payment of the tax. Section 910, as the Court below held, and not Section 3313 as the appellants contend, thus provides the applicable period of limitations for estate taxes.

Cases which have held Section 3313 applicable to erroneous assessments of *income* tax, because no other section of the Code refers to erroneous assessments of income tax, are inapplicable to the present case since the tax involved is estate tax, the assessment admittedly is erroneous, and Section 910 specifically refers to erroneous assessments.

The statutory development of Section 910 and administrative practice thereunder show clearly that Section 910 is applicable to all estate tax refund claims. This administrative interpretation has been unchanged for more than twenty years and may be deemed to have the force and effect of law.

ARGUMENT.

THE APPELLANTS' CLAIM FOR REFUND IS BARRED BY STATUTE OF LIMITATIONS AS PRESCRIBED BY SECTION 910, INTERNAL REVENUE CODE.

This suit is brought to recover an assessment of estate taxes paid on January 12, 1942, alleged to be erroneous and illegal.[2] The appellants' claim for refund was not filed until November 16, 1945, more than three years after the payment of the tax. The claim was rejected by the Commissioner on the ground that it was barred by Section 910 of the Internal Revenue Code, *supra.* The appellants, however, assert that their refund claim was timely filed because it is governed by Section 3313 of the Internal Revenue Code, *supra,* despite the exceptive clause in that section which removes from its provisions income, war-profits, excess-profits, *estate* and gift taxes. The narrow issue presented, therefore, is whether the refund claim was governed by Section 910 or Section 3313.

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[2]*Maass v. Higgins,* 312 U.S. 443, apparently supports the appellants' allegation that the assessment was erroneous. Certainly for the purpose of the case that issue is conceded.

Section 910 provides that all claims for the refunding of estate taxes alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years after the payment of such tax. Section 3313 provides that all claims for the refunding of any internal revenue tax must, *except* as otherwise provided by law in the case of income, war-profits, excess-profits, *estate* and gift taxes, be presented to the Commissioner within four years after the payment of such tax.

Despite the appellants' insistence to the contrary, the Court below held that a claim for refund of estate tax filed more than three years after the tax is paid is untimely under Section 910. The necessity for a timely refund claim being jurisdictional[3] the complaint was dismissed. (R. 24, 25-26.) The decision (R. 16-19) properly rejected as inapplicable the distinction drawn by this Court in *Huntley v. Southern Oregon Sales,* 102 F. (2d) 538, between Section 3313 and Section 322 which governs *income* tax refunds.

The appellants recognize that the *Southern Oregon* case as well as others cited by them which rely on the authority of *Southern Oregon*[4] do not precisely gov-

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[3]Section 3772(a)(1), Internal Revenue Code; *Rosenman v. United States,* 323 U.S. 658; *Tucker v. Alexander,* 275 U.S. 228, 231; *United States v. Felt & Tarrant Co.,* 283 U.S. 269, 272.

[4]*Jones v. Liberty Glass Co.,* 159 F. 2d 316 (C.C.A. 9th), certiorari granted June 2, 1947; *Kavanagh v. Noble,* 66 F. Supp. 258 (E.D. Mich.), affirmed *per curiam,* 160 F. 2d 104 (C.C.A. 6th), certiorari granted June 2, 1947; *Huntley v. Southern Oregon Sales,* 102 F. 2d 538 (C.C.A. 9th); *United States v. Lederer Terminal W. Co.,* 139 F. 2d 679 (C.C.A. 6th).

ern the question here presented. Those cases, whether correctly or incorrectly, held that erroneous assessments of income taxes are governed by the provisions of Section 3313 because the section which specifically refers to income taxes, Section 322, governs only "an overpayment" of such taxes, and the courts thought there is a difference between overpayments and erroneous assessments. Although the Government vigorously disputes the correctness of those decisions (its petitions for certiorari were granted by the Supreme Court on June 2, 1947 to review the decisions in *Jones v. Liberty Glass Co.,* 159 F. (2d) 316 (C.C.A. 9th), and *Kavanagh v. Noble,* 66 F. Supp. 258 (E.D. Mich.), affirmed *per curiam,* 160 F. (2d) 104 (C.C.A. 6th)), it is submitted that they are wholly inapplicable to the problem presented by this case. Admittedly, the assessments here made were erroneous. It is not suggested by the appellants that they fall into the so-called "overpayment" category.

There can be no doubt that the two sections under consideration are mutually exclusive. It cannot be argued that erroneous assessments of estate taxes are not governed by Section 910, as it was argued in *Southern Oregon* that erroneous assessments of *income* taxes are not governed by Section 322, because Section 910 explicitly refers to such erroneous assessments. The appellants are, therefore, forced to another distinction, namely, that where an assessment is erroneous or illegal it cannot be a "tax imposed by this subchapter" as Section 910 provides. In other words, the appellants argue that illegal assessments

are not taxes at all and, therefore, are not imposed by the estate tax subchapter.[5]

No authority whatever is cited for this proposition —nor is there any to support it. The distinction suggested would completely nullify Section 910. If estate taxes erroneously or illegally assessed or collected are not covered by that section, then the section must be meaningless, since erroneous and illegal assessments or collections are alone referred to. Moreover, the statutory development of Section 910 and the administrative practice thereunder clearly show that the suggestion is entirely novel and without merit. Prior to the Revenue Act of 1926, c. 27, 44 Stat. 9, estate tax refund claims were encompassed in Section 3228 of the Revised Statutes, as amended (the forerunner of Section 3313). Section 319 of the Revenue Act of 1926, however, withdrew these taxes from Section 3228 and provided separate treatment for them. See *Hills v. United States,* 55 F. (2d) 1001, 1003 (C. Cls.); *United States v. Clarke,* 69 F. (2d) 748 (C.C.A. 3rd), certiorari denied, 293 U.S. 564; *Brewer v. National Life & Acc. Ins. Co.,* 119 F. (2d) 313, 315 (C.C.A. 6th); *cf. San Joaquin Light & Power Corp. v. McLaughlin,* 65 F. (2d) 677, 681 (C.C.A. 9th); *Union Trust Co. v. United States,* 70 F. (2d) 629 (C.C.A.

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[5]*Maass v. Higgins,* 312 U.S. 443, does not support the appellants' contention that taxes imposed under an interpretation of the estate tax subchapter inconsistently with that decision are not estate taxes. The Court merely determined that the assessment was erroneous. However, since the tax was paid as an estate tax, although admittedly erroneous, Section 910 explicitly provides the limitation period for refunds thereof.

2nd). This separate treatment has never thereafter been changed.[6] Nothing in the legislative history indicates that some refund claims were withdrawn from Section 3228 while others remained.[7]

The Treasury Regulations since 1926 have contained only one article dealing with the time limit on claims for refunds of estate taxes imposed by that or any later Revenue Act.[8] These regulations have consistently and unequivocally provided that all estate tax refund claims be filed within the time prescribed by Section 910 or its predecessors. The language of this article, Section 81.96 of Regulations 105, *supra,* does not express or imply any possible exception such as that for which the appellants contend. This administrative interpretation has been unchanged for more than twenty years. By virtue of the successive reenactment of the statute without substantial change that interpretation may be deemed, under familiar principles, to have the force and effect of law. *Taft v. Commissioner,* 304 U.S. 351, 357; *Helvering v. Winmill,* 305 U.S. 79, 83; *Douglas v. Commissioner,* 322 U.S. 275, 281-282; *Boehm v. Commissioner,* 326 U.S. 287, 291-292.

The single case which may be thought of as supporting the appellants' position is *In re Tindle's*

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[6]See Section 810, Revenue Act of 1932, c. 209, 47 Stat. 169.

[7]H. Rep. No. 708, 72nd Cong., 1st Sess., p. 50 (1939-1 Cum. Bull. (Part 2) 493); S. Rep. No. 665, 72nd Cong., 1st Sess., p. 53 (1939-1 Cum. Bull. (Part 2) 535).

[8]Article 99 of Regulations 80 (1934 and 1937), and Regulations 70 (1926). *Cf.* Article 99 of Regulations 68 (1924) and of Regulations 63 (1921).

Estate, 59 F. Supp. 667 (E.D. Pa.), affirmed *per curiam, sub nom., Pennsylvania Co. for Insurance on Lives v. United States,* 152 F. (2d) 757 (C.C.A. 3rd). The District Court in reaching its decision, relied on the group of income and gift tax cases which drew a distinction between Section 322 and Section 3313. Since the taxes involved there were estate taxes, they were governed by Section 319(b) of the Revenue Act of 1926, the forerunner of Section 910 of the Code. The District Court's decision in that case on this question is, therefore, patently wrong and wholly unreliable as a precedent. More significantly, however, the decision certainly does not in any way turn on the distinction between taxes "imposed" by the estate tax subchapter and those *not* imposed thereby. The case must stand on its own reasoning and, when closely analyzed, cannot be justified. Any value the case might have is also weakened by the presence of a question whether a rider attached to the tax return constituted an informal claim for refund which would have been timely and cured by the formal claim for refund later filed. It was this question which formed the principal ground for debate in the case. Since the decision could presumably have been sustained on this later ground, the Government did not deem it desirable to petition for certiorari.[9]

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[9]The appellants' statement (Br. 9) that "The failure of the Government to ask for a review of the decision in the *Tindle* case by the Supreme Court of the United States is strong evidence that the Government was satisfied with the decision" is therefore manifestly unwarranted.

The Court below in rejecting the *Tindle* decision (R. 18-19) relied to some extent on *Rosenman v. United States, supra,* wherein Section 910 was held applicable to estate tax refund claims. Since the controlling effect of Section 910 was not there challenged, the decision is perhaps not decisive of the present issue. Nonetheless it affords additional evidence that the appellants' contention is without support. As has been shown there are persuasive reasons why the contrary has been assumed and acknowledged without question.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Dated, San Francisco,
September 3, 1947.

Respectfully submitted,

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